

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-CV-329-GKF-PJC
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA’S REPLY MEMORANDUM IN FURTHER SUPPORT OF
MOTION TO EXCLUDE DEFENDANTS’ EXPERT REPORT
REGARDING THE FEASIBILITY OF PLAINTIFFS’ HYPOTHETICAL
ALUM REMEDIATION STRATEGY**

Plaintiff, the State of Oklahoma (“the State”), hereby submits this reply memorandum in further support of its Motion to Exclude Defendants’ Expert Report Entitled “Evaluation of Hypothetical Remediation Strategy Presented in Stratus Contingent Valuation Study” (Dkt. #2242) (“State’s Motion”).¹

I. Introduction

In responding to the State’s Motion, Defendants contend that the State moves to strike the Connolly Report “on the basis that misleading survey participants with ‘information that is not factually correct’ is allegedly commonplace and appropriate in CV public opinion surveys, rendering the Connolly Report irrelevant.” (Defendants’ Brief (Dkt. #2317) (“Defs.’ Brf.”) at 2.) What Defendants’ Response ignores, however, is that the use of counterfactuals is not simply “alleged” to be “commonplace and appropriate in CV public opinion surveys” (*id.*). As support for the fact that presenting counterfactual information is well-accepted in contingent valuation

¹ Defendants’ Response was filed late. The State’s Motion was filed on June 17, 2009. Pursuant to LCvR 7.2(e), Defendants’ Response was due on July 6, 2009, but was filed on July 7, 2009.

methodology, the State has presented to the Court, among other authorities, the Declarations of Dr. Michael Hanemann and Dr. Roger Tourangeau. (Dkt. #2242-3 (Hanemann), #2242-4 (Tourangeau).) Dr. Hanemann's credentials are summarized in the State's Motion (p. 20 n.8), and his curriculum vitae is attached as Exhibit K thereto (Dkt. #2242-12). Dr. Tourangeau's credentials are also summarized in the State's Motion (p. 20 n.9), and his curriculum vitae is attached as Exhibit L thereto (Dkt. #2242-13). Dr. Hanemann's and Dr. Tourangeau's Declarations need not be repeated here, but in brief, they provide in part:

- “The use of a tradeoff based on a scenario which is seen by respondents as plausible, while actually containing factual inaccuracies, is a well accepted practice in stated preference analysis, including contingent valuation and choice experiments. It is a well-established and accepted method for achieving valid and reliable measurements of value. In many *ex ante* analyses of government programs, the means of accomplishing and delivering a program is not known at the time, and analyses of the public's preferences proceed with an assumed scenario that people find plausible and respond truthfully to.” (Dkt. #2242-3, Hanemann Decl. ¶ 12.)
- “In social science research particularly social psychology, it is a well-established, standard and common practice that information be withheld from the study participants or that information that is not factually correct be provided to them. The acceptability of this practice is discussed at length in the social science literature.” (Dkt. #2242-4, Tourangeau Decl. ¶ 5.)

In their Response, Defendants present no testimony or authority to counter those declarations as a matter of economics, contingent valuation, or survey methodology.

II. Argument

A. Drs. Connolly and Coale Are Not Qualified To Opine on the Validity of the CV Survey

Defendants claim that Connolly and Coale merely address “the natural science assumptions underlying the Stratus CV opinion survey.” (Defs.’ Brf. at 3.) Creating this as their premise, Defendants go on to recite at great length only the various natural science opinions of Connolly and Coale and their expertise to render those opinions. (*Id.* at 3-6.) They make no

attempt, however, to argue that Dr. Connolly or Dr. Coale has any education, training, or expertise in matters of economics, contingent valuation, or survey methodology. Nor could they, for the reasons set forth in the State's Motion. (Dkt. #2242, State's Motion, pp. 4-9, 12-15.)

Defendants go on to make the following representations:

- "Drs. Connolly and Coale do not offer economic or sampling theory testimony." (Defs.' Brf. at 6.)
- "Neither Dr. Connolly nor Dr. Coale will give any testimony regarding contingent valuation theory or survey techniques." (*Id.*)

That being the case, the Court should strike from the Connolly Report all opinions and related testimony regarding the validity of the CV Study. Such opinions are peppered throughout the Report. (*See, e.g.*, Dkt. #2242-2, Connolly Report, Ch. 1, p. 2 ("Because the respondents were given inaccurate and faulty information about the status of the Illinois River Watershed and to Lake Tenkiller, the Survey is not valid and its CV estimate is therefore meaningless."); *id.*, Ch. 2, p. 11 ("Because the Survey results are based on inaccurate statements regarding the current state of ecological conditions in the Illinois River Watershed, the results of that survey that pertain to willingness-to-pay are invalid"); *id.*, Ch. 3, p. 18 ("Because Survey respondents were not informed regarding the possibility of biological damage associated with alum application to the lake and river, their responses with respect to willingness-to-pay are invalid.")) Dr. Connolly further opines throughout Chapters 2 and 3 on, for example, the appropriate level of specificity and the use of photographs in a CV survey, among other CV-specific findings. Because neither Dr. Connolly nor Dr. Coale has any expertise in economics, CV, survey methodology and sampling theory – *and Defendants now represent that Connolly and Coale will not testify on such matters* – the opinions set forth in the Connolly Report relating to such matters should be stricken.

B. Opinions in the Connolly Report Regarding the Alum Scenario Should Be Excluded as Irrelevant

As fully explained in the State's Motion, the opinions in the Connolly Report regarding the implementability, efficacy, and any collateral impacts of the CV survey's alum scenario are irrelevant considerations in the assessment of the validity of the survey, survey responses, and resulting analysis. These issues are simply irrelevant as a matter of contingent valuation and survey methodology. (*See* Dkt. #2317, State's Motion, pp. 17-25.) Defendants present *no* authority to support a contrary view. (Defs.' Brf. at 9-16.) They simply present unsupported argument that "the representations Plaintiff[] made or did not make to survey participants regarding alum were clearly relevant to the survey outcome." (*Id.* at 11.)

Defendants' reference to various comments by one of the Stratus team's peer reviewers, Dr. Kerry Smith, is a red herring. (Defs.' Brf. at 14.) Defendants take these quotations out of the overall peer review context. As Dr. Bishop (one of the members of the Stratus team) testified, Dr. Smith's comments arose in the context of suggesting ways in which the survey might be improved; it did not represent his final view on the survey's validity or reliability.² (Dkt. #2272-5, Bishop Dep. at 142:12-143:15.) Dr. Smith's comments do not stand for the proposition that the implementability, efficacy and collateral impacts of the alum scenario are relevant considerations in assessing the validity of the CV Study.

C. The Connolly Report Is Not Relevant to Assessing Whether the Stratus CV Survey Measures Natural Resource Damages

Defendants improperly argue that natural resource damages are limited to restoration costs. (Defs.' Brf. at 16-18.) In *Ohio v. U.S. Dep't of Interior*, 880 F.2d 432 (D.C. Cir. 1989),

² Dr. Bishop also explained that as the review process proceeded, the team had at least one phone conversation with Dr. Smith, who "was satisfied that there was not a weakness where he thought there might be one." (Dkt. #2272-5, Bishop Dep. at 143:10-13, *see also id.* at 142:5-143:15, 156:1-157:20.) The team also improved the survey to address his concerns. (*Id.* at 142:1-7.)

the D.C. Circuit Court of Appeals expressly held that “the regulation limiting damages recoverable by government trustees for harmed natural resources to ‘the lesser of’ (a) the cost of restoring or replacing the equivalent of an injured resource or (b) the lost use value of the resource is directly contrary to the clearly expressed intent of Congress and is therefore invalid.” 880 F.2d at 438. Indeed, CERCLA provides that the measure of damages “shall not be limited by” restoration costs. 42 U.S.C. § 9607(f)(1). *See* 73 Fed. Reg. 57259, 57265 (Oct. 2, 2008). As the court stated in *Ohio*: “This provision obviously reflects Congress’ apparent concern that its restorative purpose for imposing damages not be construed as making restoration cost a damages ceiling.” 880 F.2d at 445-46. Thus, Defendants’ premise in this regard is simply wrong.

D. The Connolly Report Is Not Relevant To Whether Respondents Found the Injury Description or Alum Scenario Plausible

Finally, Defendants argue that Connolly and Coale’s opinions are relevant to whether the CV survey respondents found the survey’s injury description and alum scenario plausible (Defs.’ Brf. at 18-20) – plausibility being the standard, as explained in the Hanemann and Tourangeau Declarations. Connolly and Coale simply have no expertise in economics, contingent valuation, or survey methodology to opine on whether the survey respondents found the injury description and alum scenario plausible. While Connolly and Coale may have expertise in soil science and agricultural production, they are not qualified to opine on the plausibility of the injury description and alum scenario to *the respondents*.

III. Conclusion

Based on the foregoing and the State’s opening brief, the State respectfully requests that the Court grant its Motion in Limine (Dkt. #2242) and enter an order excluding the Connolly Report and any related testimony.

Respectfully Submitted,

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